NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE

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QUESTIONS PRESENTED FOR REVIEW[1]

Respondent Gaedecke, being dissatisfied with the presentation of petitioner, submits the following:

1. Does new Section 23 of Section 208 (43 U.S.C. § 1349) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629, 657-659), "Citizen Suits, Court Jurisdiction, and Judicial Review," give federal courts *EXCLUSIVE* jurisdiction over this common law negligence action for personal injury?

2. Does this court have *jurisdiction* to consider the subject of federal income taxes in computing damages when petitioner *failed to comply with Texas procedure* in requesting the Texas district court, where the case was tried, to instruct the jury that any damage award to plaintiff Gaedecke is not income to him within the meaning of the federal income tax law?

3. (a) Assuming *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (February 19, 1980) is applicable to the case at bar, is the failure to submit a nontaxability damage instruction to the jury harmless error under the facts of this case?

(b) Should the holding of this court in *Liepelt,* a *Federal Employer's Liability Act ("FELA") wrongful death case* approving a jury instruction not to consider federal income taxes in fixing its award, be applied to this *common law negligence case for personal injury governed by the law of Louisiana?*

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1. Parties to the proceeding in the court whose judgment is sought to be reviewed are: Gulf Offshore Company, a Division of the Pool Company, Mobil Oil Corporation and Steven Gaedecke. They are sometimes referred to by abbreviated name—"Gulf," "Mobil," "Gaedecke."

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BRIEF OF RESPONDENT STEVEN GAEDECKE

JURISDICTION AND A PARTIAL OBJECTION THERETO

1. Gaedecke concedes that this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider the question of exclusive jurisdiction, *vel non*, of United States district courts under Section 23(b)(1) of Section 208 of the "Outer Continental Shelf Lands Act Amendments of 1978" to the original 1953 Lands Act (43 U.S.C. § 1349(b)(1)).

2. He denies that this Court has jurisdiction to consider the Texas trial court's failure to instruct the jury to exclude federal income taxes in computing damages because, even if this is a federal question, Gulf did not preserve the matter for review in accordance with the Texas Rules of Civil Procedure. To maintain jurisdiction on the ground that a state court has denied a federal right that right must be asserted according to state practice and procedure. *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 308 (1903); *Wolfe v. State of North Carolina,* 364 U.S. 177, 195 (1960). Failure to do so "is an adequate state ground for a decision below." *Edelman v. People of State of California,* 344 U.S. 357, 359 (1953).

3. After Gulf called the attention of the Texas Supreme Court, prior to its judgment, to the pendente lite decision of this Court in *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (Feb. 19, 1980), concerning jury instructions on income tax in FELA cases (Gulf's Supplemental Brief of the Argument Under The Twelfth Point), Gaedecke immediately objected to its consideration because it had been waived (Gaedecke's Reply to Petitioner's Supplemental Brief Under Its Twelfth Point, p. 3).[2]

As *Liepelt* is against a mountain of contrary authority, the ruling of this Court in that case could not have been

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2. Gaedecke attempted under S.Ct. Rule 30 to have his short objection, which is in the certified record, included in the Joint Appendix. But counsel for petitioner refused to include it, according to him, *in accordance with the instructions of the Clerk of this Court.* As we read the rule, the Joint Appendix is to be prepared by the parties, *not the Clerk.* Rule 30.3. We are therefore compelled to inconvenience the Court by referring to relevant portions of the record that have not been printed. Rule 30.2.

reasonably anticipated. Thus, it was in the Texas Supreme Court that the first opportunity arose (and in fact the first necessity) for raising Gulf's waiver of its right to complain of the refusal of its requested instruction. *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Saunders v. Shaw,* 244 U.S. 317, 320 (1916); *State of Missouri v. Gehner,* 281 U.S. 313, 320 (1930), complaint first raised in motion for rehearing in state supreme court.

Liepelt was both a judicial innovation and a surprise (See p. 41, *infra*). The Texas Supreme Court has broad license to consider matters not either suggested to the trial court or presented to the Court of Civil Appeals. See *Texas Gas Utilities Company v. Barrett,* 460 S.W.2d 409, 416, 417 (Tex. 1970); *Texas & P. Coal Co. v. Lawson,* 34 S.W. 919, 921 (Tex. 1896). And in doing so it may look to the transcript as to any facts not passed on by the Court of Civil Appeals. *Brown v. City Service Co.,* 245 S.W.2d 656, 657 (Tex. Comm. App. 1922, holding approved).

Further, Tex. R. Civ. P. 481 (Appendix A hereto) permits amendment of a reply to an application for a writ of error "at any time when justice requires." The rule is applied liberally. *Great American Insurance Co. v. Langdeau,* 379 S.W.2d 62, 70 (Tex. 1964); *Cochran v. Wool Growers Central Storage Company,* 166 S.W.2d 904, 906 (Tex. 1942).

(a) We objected in the Texas Supreme Court because:

> *As the record fails to show that the trial judge acted on Gulf's requested Instruction C, directing the jury not to consider federal income taxes in awarding damages, any error was waived and presents nothing for appellate review.* (Gaedecke's Reply, *supra,* pp. 2, 3).

Tex. R. Civ. P. 276 (Appendix B hereto) provides that when a requested instruction is refused by the trial judge, "he shall endorse thereon 'Refused' and sign the same officially." Gulf's requested Instruction No. C *does not show it was either presented to or acted upon by the trial judge* (Chinese copy at J.A. 12). It was therefore waived and presented nothing for review. *Newman v. Delhi Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ); *Jones v. Smith*, 466 S.W.2d 47, 49 (Tex. Civ. App.—Fort Worth, 1971, writ ref'd n.r.e.); 3 McDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.59, p. 431 (rev. ed. 1970). It is only after the requested instruction is endorsed "Refused" that Rule 276 makes it a bill of exceptions. *Newman, supra.*

It is true that the trial judge *signed*, but did not refuse, Gulf's requested Instruction A, but he *did not either sign or endorse "Refused"* on requested Instruction C as to federal income taxes (J.A. 11, 12). His naked signature on A is meaningless to show C was refused, even assuming requested Instructions A, B and C were filed together.

(b) We further objected in the Texas Supreme Court because:

> *As Gulf presented no evidence whatsoever as to federal income taxes it was not entitled to a jury instruction on the subject.* (Gaedecke's Reply, *supra*, p. 3).

It is uniformly held by the Texas courts that jury instructions should not be given as to any matter not raised by the evidence. *Missouri K. & T. Ry. Co. v. Strafford*, 31 S.W. 319 (Tex. 1895); *Houston East & West Texas Ry. Co. v. Matthews*, 12 S.W.2d 163, 164

(Tex. Comm. App. 1929, holding approved); *Gonzalez v. Texas Department of Human Resources,* 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.), cert. den. 100 S.Ct. 1079; HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959).

Petitioner does not assert that any evidence was introduced regarding federal income taxes, and none was in fact introduced. With no evidence there was no legal basis to submit requested Instruction C under Texas procedure.

Jury issues in a case based on a federal statute and tried in a state court must be given in accordance "with local rules of practice and procedure." *Chesapeake and Ohio Railway Company v. De Atley,* 241 U.S. 310, 317 (1916).

In *Monger v. Florida,* 405 U.S. 958 (1972), this Court denied a petition for certiorari to the Supreme Court of Florida because, contrary to state rules of appellate procedure, the petitioner filed a notice of appeal after the oral entry of judgment but before a written nunc pro tunc order. Respondent said the state rules of appellate procedure were necessary "to avoid chaotic and haphazard appellate proceedings," and in any event the action of the Florida Court *rested upon an adequate state ground* and thus not within this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3). This Court agreed.

It is submitted that the Court has improvidently granted a writ to consider the applicability of *Liepelt* to this case. The record contains no bill of exceptions perfected in accordance with state procedure. *Chappell v. Bradshaw,* 128 U.S. 132 (1888); *Nielson v. Lagow,* 53 U.S. 98, 110 (1851).

STATUTES WHICH THE CASE INVOLVES

Gulf cites Section 1333(a)(1), (2) and (b) of Title 43 of the United States Code as being the statutes which the case involves (Brief for Petitioner, p. 2-4). Sections (a)(1) and (b) are from the original 1953 Lands Act (67 Stat. 462, c. 345, § 4). However, when counsel refers to Section 1333(a)(2), Brief for Petitioner, pp. 3, 4), he quotes the Act as amended in 1975 and in 1978 and numbers it incorrectly. See 88 Stat. 2146; 92 Stat. 635.

This case actually turns on the "Outer Continental Shelf Lands Act Amendments of 1978," Pub. L. 95-372, 92 Stat. 629, September 18, 1978.

Section 208 of the 1978 Amendments, 92 Stat. 649, amends the 1953 Lands Act by adding a "new" Section 23 (43 U.S.C. § 1349, 92 Stat. 657-659), viz.,

> SEC. 23. CITIZEN SUITS, COURT JURISDICTION, AND JUDICIAL REVIEW.—(a)(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.
>
> (2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropirate (sic) Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropirate (sic) Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions

allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b)(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose. (Emphasis ours.)

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 18 of this Act shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record con-

sidered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way.

Section 203(a) of the 1978 Amendments, 92 Stat. 635, amended 43 U.S.C. § 1333(a)(2), Section 4 of the original 1953 Lands Act, gave it a new number, (a)(2)(A), and it now reads as follows as 43 U.S.C. § 1333 (a)(2)(A):

(a)(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of

such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

STATEMENT OF THE CASE

Gaedecke submits the following statement of the case because of Gulf's omission of complete references to the Joint Appendix or the record as required by Supreme Court Rule 31(g):

This common law negligence action for personal injury was filed on November 20, 1975 by Gaedecke, as plaintiff, in the 215th District Court of Harris County, Texas against Mobil, L.A. Levy, Inc., and Arthur Levy Boat Service, Inc. He sued for injuries sustained on September 22, 1975 aboard a boat provided by Mobil for his negligently delayed emergency evacuation from a drilling platform owned by Mobil. The boat was owned by "Levy" and operated by "Boat Service" (Tr. 2).[3] The platform was located outside territorial waters in the Gulf of Mexico off the Louisiana coast (S.F. 35, 36; Tr. 128).

Gaedecke was an employee of Gulf, and Mobil, on February 16, 1977 sued Gulf as a third party defendant for contractual indemnity (Tr. 19). Gaedecke added Offshore Crews as a defendant (Tr. 31). Employers' National Insurance Company was an intervenor (Tr. 291).

Prior to trial, "Levy," "Boat Services" and "Offshore" were non-suited by Gaedecke (Tr. 291).

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3. References to the record are: District Clerk's Transcript (Tr., followed by the page); Court Reporter's Transcript (S.F., followed by the page).

Trial, which began on November 20, 1978 in the 129th District Court of Harris County, Texas, was to a jury. Based on answers to special issues finding Mobil guilty of negligence, causation and damages, the district court on December 18, 1978 rendered judgment for Gaedecke against Mobil for $900,000.00, less $32,712.09 payable to "Employers'," and granted Mobil indemnity from Gulf for all sums it was required to pay under the judgment (Tr. 291).

Gulf appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, which, on December 12, 1979, affirmed the judgment of the district court (J.A. 37), and on January 9, 1980, overruled Gulf's motion for rehearing (J.A. 38). Gulf then filed an application for a writ of error in the Texas Supreme Court, which was "Refused, No Reversible Error" on June 18, 1980 (J.A. 40). Gulf's motion for rehearing in that court was overruled on July 16, 1980 (J.A. 41).

SUMMARY OF THE ARGUMENT

I.

STATE AND FEDERAL COURTS HAVE CONCURRENT JURISDICTION UNDER THE LANDS ACT

1. Federal courts, as opposed to state courts of general jurisdiction, are courts of limited jurisdiction and must confine their jurisdiction to the precise limits the Lands Act has defined. The original 1953 Lands Act gave federal district courts *"original jurisdiction"* of controversies arising out of operations on the Shelf. 43 U.S.C. § 1333(b). It does not even suggest *"exclusive jurisdiction"* in the federal courts.

2. On *September 18, 1978,* Congress enacted the Outer Continental Shelf Lands Act Amendments of 1978 adding a *new* jurisdictional provision (Section 23(b)(1) of Section 208) in lieu of the 1953 jurisdictional provision in 43 U.S.C. § 1333(b). Section 23 is entitled, "Citizens Suits, Court Jurisdiction and Judicial Review." Section 23(b)(1) gives federal district courts *"jurisdiction,"* not exclusive jurisdiction. This was the law when this case was tried in the Texas district court (November 20-22, 1978), when final judgment was rendered in that court (December 18, 1978), in the Texas Court of Civil Appeals (December 12, 1979) and in the Texas Supreme Court (June 18, 1980). See J.A. 2-4.

3. All three Texas courts were thus obligated to apply the pendente lite statutory law which was in effect at the time they rendered their respective judgments: that was the new 1978 Lands Act Amendments (Section 23(b)(1) provision for "Jurisdiction." They did not have authority to add the word *"exclusive"* to Section 23(b)(1), codified as 43 U.S.C. § 1349(b)(1); nor does this Court.

4. *Alternatively,* the legislative history of the 1978 Amendments shows (a) they were a comprehensive revision of the entire 1953 Lands Act; (b) rights under the common law were not barred; (c) the jurisdictional section, 43 U.S.C. § 1349(b)(1), relates *only* to citizen suits; and (d) state court jurisdiction over personal injury claims were not disturbed by the Act.

5. However, even if the 1953 Act and 1978 Amendments give the federal courts jurisdiction over common law personal injury suits the grant of jurisdiction to a

federal court does not either imply a denial of historic state court jurisdiction or give a federal court *exclusive* jurisdiction. Even when state court litigation is based on a federal statute, the state courts have concurrent jurisdiction with the federal courts. It follows that under the original 1953 Lands Act, and as amended in 1978, both state and federal courts have and have had *concurrent* jurisdiction over the case at bar.

6. In 1953 historic state court jurisdiction existed on the Shelf by virtue of the "savings clause" in 28 U.S.C. § 1333. On that date state courts had jurisdiction under the common law to adjudicate in personam maritime claims, including a cause of action for personal injury. If Congress wanted the Lands Act to give the federal courts *exclusive* jurisdiction of such claims, it was obliged to do so by unequivocal statutory language so stating. It did not do so in either the original 1953 Act or the 1978 Amendments.

7. As Congress did not grant the federal courts exclusive jurisdiction over torts on the Shelf, and the states had historical jurisdiction over such torts, Gaedecke was free to sue Mobil in the Texas courts. His cause of action was transitory and he obtained personam jurisdiction over Mobil. The only effect of the Lands Act was to require that the case be governed by the Law of Louisiana.

II.

NORFOLK & WESTERN RY. CO. V. LIEPELT, 444 U.S. 490, 100 S.CT. 755, 62 L.ED. 689 (1980) IS NOT APPLICABLE TO THE CASE AT BAR

1. The case at bar is not an excessive verdict case unsupported by the evidence, as was *Liepelt*. On the con-

trary, the undisputed evidence of physical pain and suffering, lost earnings, mental anguish and physical impairment negates any finding that the jury was operating under any misconceived notions of the federal income tax laws. The result is that Gulf has failed to sustain its burden to establish prejudicial error, and the failure to submit its requested instruction on federal income taxes was harmless error.

2. The instant case is a *common law negligence action for personal injuries* brought by Gaedecke in a *Texas* District Court for injuries sustained while being evacuated from a drilling platform in the Gulf of Mexico off the coast of *Louisiana*. Under the 1978 Amendments to the Lands Act, Louisiana law was applicable, yet there was no proof in the Texas courts of Louisiana law as to either negligence or damages.

3. The Lands Act gives Gaedecke no federal or any other cause of action, or even implies one; it only adverts to Louisiana law for a remedy.

4. *Liepelt*, which approved a jury instruction not to consider federal income taxes in its award, was a wrongful death case that arose under the FELA, and not under state common law, as the instant case. Further, *Liepelt* requires the introduction of *evidence* regarding federal income taxes as a prerequisite to such an instruction. Gulf provided no evidence whatsoever as to federal income taxes.

5. *Liepelt*, dealing with a federal statutory cause of action, may be retroactively applied in FELA cases only. To do so in this case, governed by Louisiana law, would be a gross miscarriage of justice.

ARGUMENT

I.

THE TEXAS COURTS HAD SUBJECT MATTER JURISDICTION OF THIS CASE, AND EXCLUSIVE JURISDICTION IS NOT, AND NEVER WAS, IN THE FEDERAL COURTS

1. The 1953 Outer Continental Shelf Lands Act

It is a well established principle that federal courts, as opposed to state courts of general jurisdiction, "are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard,* 427 U.S. 1, 15 (1976). And it is a fundamental precept that the limits upon federal jurisdiction imposed by Congress "must be neither disregarded nor evaded." *Owen Equipment and Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978).

What Gulf would have this Court do is to add the word "exclusive" to 43 U.S.C. § 1333(b) by judicial fiat and make it read "*exclusive* original jurisdiction." But this Court holds that it may not by construction insert words in a statute: what Congress omits, it cannot supply. *62 Cases, Etc. v. United States,* 340 U.S. 593, 596 (1951); *Iselin v. United States,* 270 U.S. 245, 250 (1926). It is not the function of this Court to engraft upon a statute additions which Congress logically might or should have made. *United States v. Cooper Corporation,* 312 U.S. 600, 605 (1941).

Congress expresses its purpose by words. Thus, if it had intended for the federal district courts to have *exclu-*

sive jurisdiction of common law personal injury suits under the Lands Act "the ordinary dignities of speech" would have led it to say so,[4] as in the *Deep Seabed Hard Mineral Resources Act* of June 28, 1980, (94 Stat. 553, 580): "The district courts of the United States shall have *exclusive* jurisdiction over any case or controversy arising under the provisions of this Act." (Emphasis ours).

It is submitted that under the decisions of this Court, federal district courts were never given *exclusive* jurisdiction under the original 1953 Lands Act of common law negligence actions for personal injuries.

2. The Outer Continental Shelf Lands Act Amendments of 1978

On September 18, 1978, the Outer Continental Shelf Lands Act Amendments of 1978 became law (P.L. 95-372, 92 Stat. 629).

Former subsection (b) of 43 U.S.C. § 1333(b), giving United States district courts "*original jurisdiction*" was stricken. A *new* provision for "Citizen Suits, Court Jurisdiction and Judicial Review" was added (§ 208, 92 Stat. 649) in a *new* section, (§ 23, 92 Stat. 657-659), and codified as 43 U.S.C. § 1349.

The 1978 Amendments to the Outer Continental Shelf Lands Act were the result of over four years of intense work by the United States Congress, three-and-a-half years of extensive work by a special committee of the House, and "over six years work by the Senate Interior and then

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4. United States v. Cooper Corporation, (cited in the text), 312 U.S. at 606.

Senate Energy Committee." Hearings were held in more than fifteen cities, a total of 375 witnesses were heard; and more than 10,000 pages of hearing records were compiled. 124 Cong. Rec. H 508.

> For the first time in the history of the Congress, the House set up a special ad hoc select committee to handle a piece of major legislation, and the special procedure worked. Remarks of Mr. Murphy upon the signing of the 1978 Amendment, S. 124 Con. Rec. H 10007.

This was a "comprehensive revision of the OCS Lands Act of 1954 (sic)." 124 Cong. Rec. H 508.

2a. Legislative Intent of the 1978 Amendments

Gulf argues that the 1978 Amendments merely "restated" Section 1333(b) of the 1953 law (Brief for Petitioner, p. 29). It can just as well be said that Congress, in writing a new Section 23 in the 1978 Amendments, and moving the revised "jurisdictional" subsection of old 43 U.S.C. § 1333(b) into that new Section as Section 23 (b)(1), made it clear that such jurisdiction, after 1978, only relates to "citizens suits," and does not relate to common law personal injury suits.

The managers' Joint Statement says:

> It was not the intent of the managers to alter in any way the existing coverage of the Longshoremen's Act, *nor of other remedies that may be available for injury or death.* (Emphasis ours). Joint Explanatory Statement of the Committee on Conference, 124 Cong. Rec. H 8390.

And commenting on the new Section 23, the managers said:

> Rights under any other Act *or the common law to seek appropriate relief are not barred.* (Emphasis ours). Op. cit., 124 Cong. Rec. H 8400.

Section 23(a)(6), 92 Stat. 657, 43 U.S.C. § 1359 (a)(6), says so specifically:

> Nothing in this section [this includes Section (b)(1), the jurisdictional section] shall restrict any right which any person or class of persons may have under any other Act or *common law* to seek appropriate relief. (Emphasis ours.)

In the new section of the 1978 Amendments, "Citizen Suits, Court Jurisdiction and Judicial Review," (Subsection 23 of Section 208, 92 Stat. 657-659), the jurisdictional section involved here, now appears as paragraph (b)(1) of Subsection 23, codified as 43 U.S.C. 1349 (b)(1). This jurisdictional section serves as a fundament for jurisdiction of the *citizen* suits authorized in Section 23. Such *citizen suits* present "case and controversy" problems for plaintiffs, usually articulated in terms of standing to sue. *United States v. Students Chal. Reg. Agcy. Pro.*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). See Rogers, *Handbook on Environmental Law* § 1.13, (1977).

In Subsection 23 of the 1978 Act, the Congress addresses the problem of authorizing citizen suits on the one hand, and how, on the other, to make sure that such

suits do not unduly delay the desired rapid development of the Shelf. Paragraph (a) confers standing to sue on "any person having a valid legal interest which is or may be adversely affected" to "commece a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency . . . ," and paragraph (b) also creates standing, the forum and jurisdiction for such "Citizen Suits."

This "rearrangement' signals that Congress intended former 33 U.S.C. § 1333(b) now Section 1349(b)(1), to relate only to this limited class of citizen suits. The 1978 Amendments further separate the choice of law provision making the law of the adjacent state controlling, 43 U.S.C. § 1333(a)(2)(A) from the provision for jurisdiction over citizens' suits by moving the jurisdictional paragraph into a new section as 43 U.S.C. § 1349(b)(1). These changes were viewed as strengthening "citizen participation" in Shelf development. See remarks of Senator Kennedy on the 1978 Amendments, 124 Cong. Rec. S 16689.

It is also clear from a fair reading of Section 23 of the 1978 Amendments (43 U.S.C. § 1349), that this entire section relates only to citizen suits, *not personal injury suits.* Also, the Legislative history is unequivocal, as shown by the following from the Joint Explanatory Statement of the Committee on Conference (124 Cong. Rec. H 8400):

> The House Amendment provides that all suits challenging violations of the OCS Act or implementing regulations are to be in accordance with this

> new section [referring to Subsection 23 of Section 208 of the House Bill]. Rights under *any other Act or the common law to seek appropriate relief are not barred* . . . (Emphasis added).
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> * * * *
>
> Section 23 details the procedure by which citizens including lessees, or permittees, employees, local and state governmental officials, and others, can participate in enforcement of the Act. Review of certain types of actions are through administrative proceedings, followed by an appeal in a court of appeals. *Review of other actions are by suits in a district court.* (Emphasis added). Joint Explanatory Statement of the Committee on Conference, 124 Cong. Rec. H 8399.

The purpose of Section 23(a) was to provide for standing to sue, merely "adopting the law in the *Alyeska* case." [*Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).] Remarks of Mr. Wiggins, 124 Cong. Rec. H 499-500.

> Thus, under this section [Section 23, 43 U.S.C.A. § 1349], a plaintiff can only commence a suit if he has 'a valid legal interest which is or may be adversely affected.' Ordinarily, he must then give notice and wait sixty days before actually commencing litigation. However, if a citizen, with the requisite standing, can also show an imminent threat to the public health or safety, or an immediate effect on his legal interest, he may commence litigation immiately after notification, without waiting the sixty day period. Joint Explanatory Committee, Statement of the Committee On Conference, 124 Cong. Rec. H 8400.

The legislative history of the 1978 Amendments indicates that the new jurisdictional section 43 U.S.C. § 1349(b) relates only to "Citizen Suits," and that state court jurisdiction over negligent personal injury claims was not disturbed. Consequently, the Texas courts had jurisdiction over Gaedecke's in personam transitory action.

2b. Repeal of former 43 U.S.C. § 1333(b)

In *Bruner v. United States*, 343 U.S. 112, 116 (1952), this Court said:

> It is clear, that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. (343 U.S. at 116-117)

The result is that 43 U.S.C. § 1333(b), the former 1953 Lands Act jurisdiction section, was replaced by the enactment of an entirely *new* jurisdiction section, 43 U.S.C. § 1349(b)(1) on *September 18, 1978* during the pendency of this suit. In such pendente lite situations, the jurisdiction of the trial court has been held to be determined as of the date of its judgment—in this case December 18, 1978 (J.A. 3). *Merchants Insurance Co. v. Ritchie*, 5 Wall. 541 (1866).

Further, the Texas Court of Civil Appeals and the Texas Supreme Court were obliged to apply the law in effect at the time they subsequently rendered their respective decisions:

> A change in the law between a nisi prius and an appellate decision requires the appellate court to

> apply the changed law. *Ziffrin, Inc. v. United States,* 318 U.S. 73, 78 (1943).[5]

This court must, therefore, determine the jurisdiction of the Texas courts on the basis of the present controlling law. *United States v. State of Alabama,* 362 U.S. 602, 604 (1960). This presents no "manifest injustice." *Bradley v. School Board of Richmond,* 416 U.S. 696, 721 (1974).

If there was any exclusive federal district court jurisdiction under the original 1953 Lands Act, when Congress enacted, pendente lite, a new jurisdictional section (43 U.S.C. § 1349(b)(1)), any so-called implied "exclusive" jurisdiction ended.

This disposes of the "authorities" cited by Gulf in support of its claim of exclusive jurisdiction (Brief for Petitioner p 11, n.3)[6] because each of these cases were decided under the original 1953 Lands Act and not the 1978 Amendments thereto. These amendments were not in issue in a single one of these cases. In fact, they undoubtedly prompted the Congressional findings in Section 101(8) of the 1978 Amendments (92 Stat. 630):

> [T]here presently exists a variety of technological, economic, environmental, administrative and *legal*

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5. This has been the rule in both federal and state courts for over 170-odd years. See cases collated in de Rodulfa v. United States, 461 F.2d 1240, 1250, n.50, 51 (D.C. Cir. 1972), cert. den., 409 U.S. 949.

6. Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757 (E.D. La. 1972); Borne v. Tenneco Oil Company, 1973 A.M.C. 388 (E.D. La.); Friedrich v. Whittaker Corporation, 467 F.Supp. 1012 (S.D. Tex. 1979); Gravois v. Travelers Indemnity Company, 173 So.2d 550 (La.App. 1965), writ ref'd 175 So. 301; Pool v. Kemper Insurance Group, 386 So.2d 1006 (La.App., May 21, 1980).

> *problems* which tend to retard the development of the oil and gas natural resources on the Outer Continental Shelf. (Emphasis ours).

By omitting the word "original" in the 1978 jurisdictional amendments, a presumption was raised that a change in meaning or purpose was intended. *Pirie v. Chicago Title and Trust Co.*, 182 U.S. 438 (1900); *Bardes v. First National Bank of Hawarden*, 178 U.S. 539 (1900), applying the rule to jurisdiction.

In *Sun Ship, Inc. v. Pennsylvania*, 100 S.Ct. 2432, 2437 (1980), the Court said:

> It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

3. Concurrent Jurisdiction

The mere grant of *jurisdiction* to a federal court does not imply a denial of historic state court jurisdiction, or give the federal court *exclusive* jurisdiction. *Chaflin v. Houseman*, 93 U.S. 130 (1876). Also see *United States v. Bank of New York Trust Co.*, 296 U.S. 463, 479 (1936). Even when state court litigation is based upon a federal statute, this Court holds that state courts have concurrent jurisdiction with the lower federal courts. *Martinez v. State of California*, 444 U.S. 277, n.7 (1980), citing *Testa v. Katt*, 330 U.S. 386, 394 (1947).

The *Chaflin* rule was followed in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) where the court considered a federal statute that did "not state or even suggest that such [federal] jurisdiction be exclusive." (368

U.S. at 506). The Supreme Judicial Court of Massachusetts, holding it had concurrent jurisdiction, said:

> We do not accept the contention that State courts are without jurisdiction. The statute does not so declare. The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State Courts. (Quoted at 368 U.S. 505).

This Court agreed and affirmed the Massachusetts court's holding that it had concurrent jurisdiction (368 U.S. at 506).

In *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) the court said it should proceed with caution in construing statutory provisions dealing with the jurisdiction of the federal courts. It quoted (404 U.S. at 212), from *Healy v. Raeta,* 292 U.S. 263, 270 (1934), as follows:

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

There are no "pragmatic factors" to require exclusive federal jurisdiction over the case at bar:

(a) This Court said of the Lands Act in *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1971) that "Congress specifically rejected *national uniformity* and specifically provided for the application of state remedies." (Emphasis ours).

(b) There is no "federal judicial expertise" for a finding of exclusive federal jurisdiction. On the contrary, as state law applies, it is state judges that have expertness in dealing with questions of state law that comes from more extended contact with such questions than federal judges.

4. Historical State Court Jurisdiction on the Shelf

Gulf does not disagree with the truism that federal courts require a specific grant of "exclusive" jurisdiction if they are to exercise "exclusive" jurisdiction (Brief for Petitioner, p. 16). But it counters with a chimera—the Lands Act does not deal with an area of concurrent federal and state jurisdiction, as it only *extended* federal jurisdiction into an *international area outside historical state jurisdiction* (Brief for Petitioner, pp. 12, 16). Gulf says the outer Continental Shelf was, at the time of the enactment of the 1953 Lands Act, *"an international jurisdictional VOID"*. (Brief for Petitioner, pp. 12-15). Ergo, "Congress did not need to employ language granting 'exclusive' jurisdiction to the federal courts" in order to establish such jurisdiction (Brief for Petitioner, p. 13).

It follows that the converse is true, if the state courts in 1953 had historical jurisdiction on the Shelf, then Congress was required to use precise *statutory language* in order to assert *exclusive* jurisdiction.

Gulf's fallacious theory will not wash for two reasons: (a) the "saving to suitors" clause of 28 U.S.C. § 1333, in force in 1953 and (b) the transitory nature of an action for personal injury.

Prior to the adoption of the United States Constitution, in personam actions based on tort were cognizable in the

English and Colonial courts of common law, notwithstanding that the same occurrence gave rise to a cause of action within the admiralty jurisdiction. 7A MOORE'S FEDERAL PRACTICE ¶ .210, pp. 2202, 2203 (1979). It was probably to preserve this concurrent jurisdiction and leave the concurrent power where it stood at common law that Section 9 of the Judiciary Act of 1789 gave United States District Courts exclusive jurisdiction of civil maritime causes and of admiralty, but "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it." *New Jersey Steam Nav. Co. v. Merchants Bank of Boston,* 47 U.S. (6 How.) 344 (1848). The Act has been much amended,[7] but despite some change in wording its effect remains unchanged. *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 361 (1959); *Madruga v. Superior Court of California,* 346 U.S. 556, 560, n.12 (1954). As amended in 1948 and incorporated in 28 U.S.C. § 1333, it reads: "saving to suitors in all cases all other remedies to which they are otherwise entitled." This was the law when the 1953 Lands Act was enacted.

The result is that in 1953 a suitor who held an in personam maritime claim, including a cause of action for personal injury, could bring an ordinary common law action against the person liable in a state court. *Romero, supra,* 358 U.S. at 475; *Madruga, supra,* 346 U.S. at 560, 561; GILMORE & BLACK, THE LAW OF ADMIRALTY 37, 40 (2d ed. 1975); 1 BENEDICT ON ADMIRALTY, § 122, pp. 8-8 -9 (7th rev. ed. 1974). He had a *historic* option to pursue a common law remedy and to select his forum, state or federal. *Romero, supra,* 358 U.S. at 371.

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7. 1 BENEDICT ON ADMIRALTY § 122, p. 8-3, n.2 (7th rev. ed. 1974).

The "savings clause" explicitly recognized that some matters maritime had been traditionally administered by common law courts of the original states. *Romero, supra,* 358 U.S. at 362.

The following cases are demonstrative:

In *The Hamilton (Old Dominion S.S. Co. v. Gilmore),* 207 U.S. 398, 404 (1907), the issue was the applicability of a Delaware wrongful death statute which had been applied in admiralty proceedings to an ex delicto claim for death on the high seas. The only doubt in the case was the power of the states where Congress has remained silent. The court said the "savings clause" in the 1789 judiciary act:

> [L]eaves open the common law jurisdiction of the state courts over torts committed at sea. This we believe has always been admitted.

Accord: *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242 (1921).

Rounds v. Cloverport Foundry & M. Co., 237 U.S. 303 (1915) held that a suit in personam against an individual defendant is not cognizable in admiralty, but is within the clause saving a common law remedy, and a state court has jurisdiction.

Panama R. Co. v. Vasquez, 271 U.S. 557 (1926) was a negligence suit under the Seaman's Act of 1915 as Amended by the Merchant Marine Act of 1920. The defendant contended that state courts could not entertain such actions because they *were cognizable only in federal district courts.* This Court disagreed. It noted that the Judicial Code then in effect was only a continuation of the "savings clause" in the Judiciary Act of 1789,

which had (1) always permitted recovery for tortious acts asserted and enforced in personam according to the course of the common law, and (2) uniformly permitted such actions to be brought in either the federal or state courts.

Also see cases cited in *Moore, supra,* § .210, p. 2204, note 9.

Such then was the law when Congress in the Original 1953 Lands Act granted federal courts "original jurisdiction" of controversies arising out of exploratory operations on the Shelf in 43 U.S.C. § 1333(b). Under the existing law, Gaedecke had a historic concurrent common law action in a state court for the personal injuries he suffered on the Shelf.

As historical concurrent state jurisdiction existed, it behooved Congress when it asserted jurisdiction of federal courts under the Lands Act, to claim *exclusive* jurisdiction by *statutory language* if exclusive jurisdiction was what was desired.

It is submitted that insofar as state court tort jurisdiction was concerned, the Shelf was not terra incognito in 1953.

5. As Congress Did Not Grant the Federal Courts Exclusive Jurisdiction Over Torts Arising On the Shelf, Gaedecke Could Pursue His Historical Common Law Remedy in Any Court That Had in Personam Jurisdiction Over Mobil.

We have shown above that (i) Congress did not grant the federal courts exclusive jurisdiction over torts on the Shelf (*supra,* pp. 16, 17, 23-25), and (ii) the states had historical common law jurisdiction over such torts (*supra,* pp. 26-29). Under these circumstances, Gaedecke was en-

titled to pursue his common law cause of action against Mobil in Texas courts of general jurisdiction where he obtained in personam jurisdiction over Mobil. *Dennick v. Central Railroad Company v. R. R. Co.,* 103 U.S. 11 (1881); *Ormsby v. Chase,* 290 U.S. 387 (1933); 20 Am. Jur. 2d *Courts* § 123 at p. 478 (1965). The transitory concept of a case that might have arisen anywhere was recognized at the beginning of the fourteenth century in the common law of England. *Reasor-Hill Corp. v. Harrison,* 249 S.W.2d 994 (Ark. Supp. 1952).

Once jurisdiction was obtained over Mobil, the Lands Act did require that the Texas courts apply the law of Louisiana, the state adjacent to the drilling platform (43 U.S.C. § 1333(a)(2)(A)). But as no proof of Louisiana law was offered under Texas procedural rules, it was presumed to be the same as the law of Texas (*infra,* p. 38).

II.

NORFOLK AND WESTERN RAILWAY COMPANY V. LIEPELT, 444 U.S. 490, 100 S.CT. 755, 62 L.Ed. 689 (1980) IS NOT APPLICABLE TO THIS CASE; BUT IF IT IS, FAILURE TO CHARGE THE JURY AS TO FEDERAL INCOME TAXES WAS HARMLESS ERROR UNDER THE FACTS OF THIS CASE

1. Assuming Arguendo Liepelt Applies to the Instant Case, Failure to Charge the Jury as to Federal Income Taxes Was Harmless Error.

In this Court, as in any other appellate court, "He who seeks to have a judgment set aside because of an erroneous

ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman,* 318 U.S. 109, 116 (1943). This burden of itself raises the harmless error rule—does the error "affect the substantial rights of the parties." 28 U.S.C. § 2111. In applying the rule, each case stands on its own record. *Kotteakos v. United States,* 328 U.S. 750, 762 (1946). The rule applies to jury instructions. See *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 629 (1959).

It is submitted that if *Liepelt* does apply to the case at bar, any error in failing to submit Gulf's Requested Instruction C on income taxes is harmless error, and presents exactly the situation considered by the Eighth Circuit in *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (8th Cir. Sept. 4, 1980), *a FELA personal injury case.*

There, the Court:

(a) Recognized that an appellant has the burden to establish the prejudicial effect of a trial court's failure to submit a requested instruction; jury instructions being subject to the "harmless error" rule (632 F.2d at 889);

(b) Held in effect that there is no hypothesis that a failure to give a nontaxability instruction causes juries to increase awards; but on the contrary, there is empirical data that juries in general do not increase recoveries in the belief that they are subject to income tax, citing Kaeven, *A Report on the Jury Project,* Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957), (632 F.2d at 890);

(c) Said that the *Liepelt* award was not supported by even the plaintiff's evidence, was a wrongful death case

where plaintiff's proof concentrated on his loss of pecuniary earnings and contribution to his dependents, whereas in the personal injury case before it, plaintiff was not only entitled to loss of future income but also *compensation for substantial pain and suffering* (*Id.*);

(d) Held that under those circumstances the verdict did not indicate that the jury erroneously speculated that plaintiff's award would be subject to income tax (*Id.*);

(e) Noted particularly that the railroad was not prevented (nor was Gulf in the case at bar) from offering evidence of net earnings as was the railroad in *Liepelt,* and it failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable, but on the contrary,

> [T]he evidence fully supports the jury's verdict and indicates the jury was not operating under any misconceived notions of the tax laws. (*Id.*).

Therefore without evidence of an excessive verdict, as in *Liepelt,* the Court found no reversible error. Accord: *Ingle v. Illinois Cent. Gulf R. Co.,* 608 S.W.2d 76, 83 (Mo. App. 1980).

We have set out the holding in *Flanigan* at length because it is on all fours with the instant case.

(1) Physical Pain and Suffering

Gaedecke was seriously injured. He required sixty days of hospitalization on five different occasions, three major operations, and some three years after the accident was still in pain. His injuries and pain are permanent (Appendix D hereto).

(2) Lost Earnings

At the time of his injury, Gaedecke was thirty years of age with a work life expectancy of thirty-five years, i.e., until he was sixty-five years of age (S.F. 220-221, 322-323). He was earning some $1,000 per month at the time of his injury in 1975, with wages for offshore oil workers increasing at about ten percent a year (S.F. 37). While on the platform he was provided food and lodging (S.F. 68). He worked seven days on the platform and had seven days off, but was paid full time (S.F. 224-225, 314, 315, 316).

A projection of Gaedecke's anticipated earnings to age sixty-five shows he would have earned $3,941,768.76.[8] This figure does not include food and lodging for half his work time or inflation. Even with 30% overall impairment for his injury (S.F. 272), this could reduce anticipated earnings to some $1,300,000.00. *Missouri K. & T. Ry. Co. v. Beadsley,* 155 S.W. 183, 187 (Tex. 1913). The jury found $900,000, obviously not excessive as this figure does not include physical pain, mental anguish or physical impairment for which he was entitled to damages under the court's charge (Tr. 240). Gaedecke's verdict is more than supported by the evidence.

It is interesting that Gulf, Mobil's indemnitor, did not pursue in the appellate courts its trial court claim that the damages in this case were without support in the evidence (Tr. 311). (See Gulf's Points of Error in the Court of Civil Appeals, Brief for Appellant, pp. 4-13). In failing

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8. Future earning capacity is arrived at by multiplying past earning capacity ($12,000 annually) by work life expectancy (35 years) and for Gaedecke an annual increase of ten percent. Green v. Rudsenske, 320 S.W.2d 228, 236 (Tex. Civ. App.—San Antonio 1959, no writ).

to raise excessive damages on appeal, Gulf abandoned the right to invoke *Liepelt,* which in its final analysis is an excessive verdict case without support in the evidence. Cf. *Ingle, supra,* 608 S.W.2d at 83.

2. Liepelt Is a FELA Statutory Wrongful Death Case and Does Not Apply to the Case at Bar, a Common Law Negligence Case For Personal Injury Governed By the Law of Louisiana.

The case at bar is a common law negligence case for personal injury governed by the law of Louisiana. *Liepelt* was a statutory FELA wrongful death case.

Under the Lands Act Gaedecke's common law cause of action for personal injuries against a nonemployer negligent tortfeasor is governed by the law of the state adjacent to the fixed drilling platform on which Gaedecke worked for Gulf. This is Louisiana. Original 1953 Lands Act, 43 U.S.C. § 1333(a)(2), and as amended in 1978, 43 U.S.C. § 1333(a)(2)(A). Such state law is "surrogate federal law." *Rodrique v. Aetna Casualty Company,* 395 U.S. 352, 365 (1969).

It is uniformly held that the law of the adjacent state, in this case Louisiana, applies to actions for personal injuries and for wrongful death sustained on offshore drilling platforms. See *Chevron Oil Company v. Huson,* 404 U.S. 97, 100 (1971); *Walker v. Tenneco Oil Co.,* 615 F.2d 1121, 1123 (5th Cir. 1980); *Moczygemba v. Danos & Curiole Marine Contractors,* 561 F.2d 1149, 1151, n.1, (5th Cir. 1977); *Bertrand v. Shell Oil Company,* 489 F.2d 293, 294 (5th Cir. 1973).

The Fifth Circuit has specifically held that in determining *damages* in cases of wrongful death and personal

injuries suffered on an offshore drilling rig adjacent to the coast of Louisiana, the law of Louisiana applies. *Dickerson v. Continental Oil Company,* 449 F.2d 1209, 1213, 1215 (5th Cir. 1971). No reason exists for a court applying Louisiana law in a suit for common law negligence to resort to the measure of damages required in a statutory federal cause of action such as FELA.

Two Circuits, *Estate of Spinosa,* 621 F.2d 1154, 1158, 1159 (1st Cir. 1980) and *Croce v. Bromley Corp.,* 623 F.2d 1084, 1096, 1097 (5th Cir. 1980), have refused to apply *Liepelt* in diversity cases because it was a FELA case and they were obliged to look to state law concerning jury instructions on income tax. *Spinosa* observed that *Liepelt* "does not mandate an across-the-board change in the majority rule" on the subject (621 F.2d at 1158). *Croce* held that the refusal to give a requested jury instruction that any award would not be subject to federal income tax would not be error in *Louisiana,* and refused to reverse and remand the case for a new trial (623 F.2d at 1097, 1098).

Judge Nickerson, sitting in the Eastern District of New York, in *Vasina v. Grumman Corp.,* 492 F.Supp. 943, 945 (E.D.N.Y. 1980) reached the same conclusion and limited *Liepelt* to FELA cases.

To apply FELA jury instructions regarding federal income tax in a case governed by Louisiana law, particularly without even knowing what that law is, would violate this Court's admonition about the Lands Act: "Federal courts should not create interstitial federal common law when Congress has directed that a *whole body* of state law shall apply." *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 105 and n.5.

There is no reason to saddle the Lands Act with the vagaries of federal common law which is limited to (1) cases in which a state is a party; (2) cases involving maritime law; (3) cases involving federal "proprietary interests"; and (4) cases concerning international law. Hill, *The Law Making Power of The Federal Courts, Constitutional Preemption,* 67 COLUM. L. REV. 1024, 1025 (1967).

Liepelt stands only for the limited proposition that the measure of damages in FELA cases is governed by the terms of the statute which created the cause of action and which defines specifically the measure of damages. It has no application to a case under the Lands Act.

3. Congress Created No Statutory Cause of Action for Personal Injuries by Enacting the Lands Act.

There is no congressional statute in this lawsuit which purports to create the cause of action for personal injuries instituted by Gaedecke, much less prescribe his measure of damages. Certainly, there is not one word in the Lands Act, and petitioner cites none, that gives Gaedecke his cause of action for personal injuries in this case. Instead we have a clear case of *casus omissus:* Gaedecke's cause of action is governed by the common law. That is, it does not rest its authority upon any express statute but upon the decisions of the Louisiana courts. See *Western Union Teleg. Co. v. Case Publishing Co.,* 181 U.S. 92, 101, 102 (1901).

That Gaedecke's common law remedy was not changed by the Lands Act is made clear by this court in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971):

> Congress specifically rejected national uniformity and specially provided for the application of *state remedies.* * * * (404 U.S. at 104) (Emphasis ours).
>
> * * * *
>
> A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and *familiar remedies.* (404 U.S. at 107, 108). (Emphasis ours).

These remedies, as they do not depend on a statute, can only be common law remedies. "The Act [Lands Act] allows a plaintiff any type of negligence, strict liability or contract actions which would be cognizable under *state law.*" (Emphasis ours). *Bourg v. Texaco Oil Co., Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

Under the Federal Tort Claims Act, 28 U.S.C. § 2674, damages are determined by the law of the place where the tortious act was committed. 28 U.S.C. § 1346(b). Both the original 1953 Lands Act and the 1978 Amendments make damages in this case determinable under the law of Louisiana.

The situation under the Federal Tort Claims Act and the Lands Act are clearly analogous. In *Draisma v. United States*, 492 F.Supp. 1317, 1327 (W.D. Mich. 1980), a Federal Tort Claims Act case, the defendant argued that as the Michigan courts had not taken a position on the question of federal income taxes in damage awards, such awards should be reduced as a matter of federal law. The Court rejected this contention and refused to apply *Leipelt* because it was a FELA case.

Following the criteria laid down in *Cort v. Ash*, 422 U.S. 66 (1975) the Fifth Circuit in an exhaustive opinion

reached the conclusion that the Lands Act affords a worker injured on the Shelf no remedy or cause of action, but on the contrary, requires him "to look to state [Louisiana] law for redress" and that such a controversy "should be controlled by state law." *Olsen v. Shell Oil Company*, 561 F.2d 1178, 1190 (5th Cir. 1977), cert. den. 444 U.S. 979. This, because no civil remedy may be implied from the Lands Act:[9]

(a) "[A] cause of action should not be created unless the primary purpose of the Act (or at least one of the primary purposes) is to benefit or protect the workers on offshore oil platforms." (561 F.2d 1187). The legislative history of the Lands Act shows that if this was the case it was "at best secondary concern." (561 F.2d at 1188).

(b) State law should govern the controversy, "not solely because there are 'gaps in the Federal Code,' " but because Congress recognized "that the individual states had a very real interest in the workers on these platforms." (561 F.2d at 1189).

The Texas district court, following Texas procedural rules, in the absence of any tender of any proof of Louisiana law on either negligence or measure of damages for personal injuries, correctly presumed that Louisiana law was the same as Texas law. Tex. R. Civ. P. 184a (Appendix C); *Gevinson v. Manhattan Const. Co. of Oklahoma*, 449 S.W.2d 458, 465, n.2 (Tex. 1969). Then, following *Turner v. General Motors*, 584 S.W.2d 844,

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9. The doctrine of an implied cause of action had its origin in Couch v. Steel, 3 E. & B. 402, 118 Eng. Rep. 1193 (Q.B. 1854). Today, its effects have been largely repudiated by the English Courts. See Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233 (1960).

853 (Tex. 1979) it refused to instruct the jury that income tax consequences of its award of damages should not be considered.

4. As No Evidence Regarding Federal Income Tax Was Introduced By Gulf, Liepelt Is Inapplicable to the Case at Bar.

In *Liepelt,* this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence,* excessive. Liepelt's expert, using gross earnings without any deduction for income taxes, produced a damage total reduced to present value of $302,000 (100 S.Ct. at 756, 62 L.Ed.2d at 689). The railroad objected to this evidence and unsuccessfully offered to prove by its own expert that taking into account decedent's federal income taxes, and making different assumtions, that the net pecuniary loss was $138,327. The jury returned a verdict of $775,000! (100 S.Ct. at 756, 757, 62 L.Ed.2d at 696). On these facts the case appears to be no more than an ordinary case of an excessive verdict without evidentiary support.

Liepelt is not germane to the present case where Gulf made no effort to introduce any evidence whatsoever of Gaedecke's estimated after-tax earning. It clearly holds that, except in cases of *de minimus,* evidence of the impact of future income tax in calculating an award is required if the jury is to be instructed that federal income tax should not be considered in fixing the amount of the award (100 S.Ct. at 758 and n.7, 62 L.Ed.2d at 697 and n.7). The Court gives these assuring words to trial judges and counsel:

> * * * But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an *expert calculation* in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. * * * (*Id.*) (Emphasis ours).

However, Gulf presented nothing to the jury in the nature of "an expert calculation," and submitted its Requested Jury Instruction C (J.A. 12) without any evidence whatsoever on which to base it. The admonitory instruction not to consider income taxes in making a damage award was given in *Liepelt* only after it was raised by evidence, both proffered and admitted.

5. On Equity and Justice

The two cases cited by Gulf as to the retroactive application of *Liepelt—Lang v. Texas Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980) and *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), (Brief for Petitioner, pp. 40, 41) are but FELA cases applying statutory federal law, not state common law.

But the foregoing legal dogma aside, as a member of the bar of this Court, I would be remiss if I did not frankly say that for this Court to now deny Gaedecke prompt compensation for serious, painful and permanent injuries[10] suffered over four years ago, the justice of which has been determined by a jury and some thirteen judges, would produce substantial inequitable results. And this only because of a failure to give a jury instruction, after the overruling, not reasonably foreshadowed, of clear past precedent. *Ingle, supra*, 608 S.W.2d at 83.

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10. See Appendix D to this brief.

To remand this case for a new trial because the Texas courts were not psychic enough to envision *Liepelt* would delay this case another four years—a total of eight. One of the reasons Judge Campbell concurred in the majority not applying *Liepelt* in *Spinosa, supra,* was that seven years had elapsed since the occurrence of the accident sued on in that case. Under those circumstances, he felt it "undoubtedly the better part of wisdom" to affirm (621 F.2d at 1163). There is no "compelling reason" to give retroactive effect to *Liepelt* here. *Ingle, supra,* 608 S.W. 2d at 83, 84.

Beginning in 1964 the Fifth Circuit consistently held no admonitory instruction as to federal income taxes should be given in a personal injury suit, even in cases based on a federal statute. *Prudential Ins. Co. of America v. Wilkerson,* 327 F.2d 997, 998 (5th Cir. 1964); *Cunningham v. Bay Drilling Co.,* 421 F.2d 1398, 1399 (5th Cir. 1970); *Greco v. Seaboard Coastline R.R.,* 464 F.2d 496, 497 (5th Cir. 1972); *Johnson v. Penrod Drilling Co.,* 510 F.2d 234, 236, 237 (5th Cir. 1975, en banc), cert. den. 423 U.S. 839. The Texas Supreme Court has so held since 1956. *Missouri-Kansas-Texas Railroad Co. v. McFerrin,* 291 S.W.2d 931, 935 (Tex. 1956); *Turner v. General Motors Corp.,* 584 S.W.2d 844, 853 (Tex. 1979). So did the great majority of cases decided in both state and federal courts since World War II. Annot. 63 ALR 2d 1393 (1959), Later Case Service p. 780 (1976); 1980 Supp.; *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880, 886, n.2 (8th Cir. 1980).

Under these circumstances, we simply fail to see where justice would be served by penalizing Gaedecke for not having the prescience as to what this Court would ab-

ruptly do with respect to charging a jury about federal income taxes in a personal injury case. *Ingle, supra,* 608 S.W.2d at 83. With all due respect, we think the Delphi oracle would have missed this one.

It will be remembered that even Alice prevailed over the King, who was acting as judge, in the famous case of *Who Stole the Tarts?* when he tried to exclude her from the courtroom under "Rule Forty-two":

> "Well, I sna'n't go, at any rate," said Alice: "besides, that's not a regular rule: *you invented it just now.*" (Emphasis ours).
>
> * * * * *
>
> The King turned pale, and shut his note-book hastily.
>
> LEWIS CARROLL, ALICE IN WONDERLAND, Chapter XII, *Alice's Evidence,* Random House, New York (1965), p. 141.

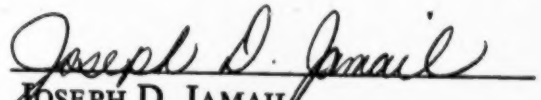
CONCLUSION

1. Neither the 1978 Amendments nor the original 1953 Lands Act give federal courts exclusive jurisdiction of this suit. If this case were dismissed for want of jurisdiction, Gaedecke would lose his remedy because of the statutes of limitation.

2. Assuming this Court has jurisdiction to determine the matter and it determines that *Liepelt* applies to this case, the failure to instruct the jury as to the nontaxability of its award, as was done in *Liepelt,* was harmless error.

The judgment of the court below should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three copies of the foregoing Brief of Respondent Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

Charles D. Kennedy, Esq.
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(3) Service on each of such parties was made on February 17, 1984, by depositing said copies of this Brief of Respondent Steven Gaedecke in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel.

Joseph D. Jamail

JOSEPH D. JAMAIL

APPENDIX A

5 Vernon's Texas Rules of Civil Procedure p. 530 (1967)

Rule 481. Amendment of Application and Briefs

The application, or brief or the argument in support thereof, or in reply thereto, may be amended at any time when justice requires upon such reasonable terms as the court may prescribe. The record and appeal bond may be amended in the Supreme Court under the same circumstances and on the same terms as in the Court of Civil Appeals under Rules 428, 429, 430 and 431.

APPENDIX B

2A Vernon's Texas Rules of Civil Procedure, p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon 'Refused,' and sign the same officially. If the trial judge modifies the same he shall indorse thereon 'Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed' and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX C

2 Vernon's Texas Rules of Civil Procedure, p. 488 (1976)

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.

APPENDIX D

Gaedecke's Injuries

The jury found compensatory damages of $900,000—lost earnings, past and future; physical pain, past and future; mental anguish, past and future; physical impairment, past and future (Tr., Vol. II, p. 240).

At the time of his injury on September 22, 1975, Gaedecke was 30 years of age (S.F. 220, 221). He had worked for Gulf since May, 1975 as a roustabout (S.F. 224). His physical condition was good and he was able to perform the heavy manual labor his job required (S.F. 223).

Because Gaedecke's leg was increasingly painful, he sought medical attention five days after his injury (S.F. 285). The result was that he spent a total of 60 days in the hospital on five different occasions and had three major operations:

FIRST: September 28, 1975 - October 11, 1975 (S.F. 102) - 13 days

SECOND: February 11, 1976 - February 22, 1976 (S.F. 103) - 9 days

THIRD: June 30, 1976 - July 9, 1976 (S.F. 104) - 9 days

FOURTH: July 9, 1976 - July 16, 1976 (S.F. 108-109) - 7 days

FIFTH: November 30, 1976 - December 20, 1976 (S.F. 104) - 20 days

First (9-28-75 - 10-11-75)

Gaedecke was treated by Dr. Zoran Cupic, an orthopedic surgeon (S.F. 234-236), who first saw him in the emergency room at Memorial City General Hospital on September 28, 1975 when he was called in because Gaedecke was in extreme pain (S.F. 239, 240, 245). The pain was in his back and radiated down the left leg having become increasingly worse since the accident (S.F. 241). This to Dr. Cupic, indicated a herniated disc —a disc out of place pressing against a nerve root, more serious than ordinary low back pain (S.F. 241). He ordered Gaedecke's immediate admission to the hospital and commenced conservative treatment—traction, physical therapy, muscle relaxants, complete bed rest, medication and heat massage (S.F. 243, 244).

This treatment did not prove effective (S.F. 245), so after several days an "EMG" was performed by inserting needles in Gaedecke's legs to measure the amount of nerve damage coming from the back and going into the leg muscles. This showed some changes and a myelogram was ordered (S.F. 246). This was done by inserting needles into the spine, injecting a dye, and while the patient was tilted back and forth on a table, x-rays were taken to see if there was, in fact, a defective disc pressing against a nerve root (S.F. 247). A damaged disc was found in Gaedecke's lower back pressing against a nerve in the left side, and surgery was decided upon (S.F. 248, 249).

On October 4, 1975, Gaedecke was operated on for the first time. Major surgery was performed whereby the offending disc was removed by laminectomy, i.e., part of the vertebrae was removed and the nerve root adjusted; not to effect a cure, but only to relieve the pain (S.F. 251, 252). It created scar tissue and caused the

loss of about a pint of blood (S.F. 252, 253). Gaedecke remained in the hospital until October 11, 1975 because of that bleeding (S.F. 253).

Second (2-11-76 - 2-22-76)

After his discharge from Memorial City General Hospital in October, 1975, Gaedecke remained under Dr. Cupic's care for some time but did not progress. In February, 1976, he had a relapse and more pain; was readmitted to the hospital on February 11, 1976, where he improved; was discharged on February 22, 1976, but continued office treatment with Dr. Cupic (S.F. 254, 255).

Third and Fourth (6-30-76 - 7-16-76)

In June, 1976 Gaedecke had another relapse (ten months after the accident). His symptoms exacerbated and he was readmitted to Memorial City General Hospital on June 30, 1976 (S.F. 255, 256). A second myelogram was performed showing a spinal defect at the same level, worse than the one prior to the surgery, severe scarring and hypertrophy of tissue around the area of the surgery (S.F. 256).

A neurosurgeon, Dr. Moiel, was called in, who was of the opinion that the scarring should be removed. The second major surgery was performed at St. Luke's Hospital on July 9, 1976—a foraminotomy, whereby part of the backbone and scarring was removed to free the nerve root in an effort to relieve his pain in both the back and leg (S.F. 256-259).

Fifth (11-30-76 - 12-20-76)

Dr. Cupic saw Gaedecke next at the end of 1976 when he again complained of low back pain. He was readmitted

to Memorial City General Hospital on November 30, 1976 (S.F. 104, 260), where he was found to be suffering from "instability of the low back" due to the surgery which had produced one of the most severe, prolonged and disabling kinds of pain that a person can sustain (S.F. 261). A "fusion," the third major operation, was performed. Bone was taken from the back of the pelvis and placed on top of the vertabra by going through the back in order to allow the bone to heal over (four to six months) so there would be no motion at that level and pain would decrease (S.F. 262). Here again the purpose was not to cure but to relieve pain, leaving the back rigid at that level (S.F. 263).

Prognosis

Notwithstanding all of the above treatment and surgery, Gaedecke will experience pain and stiffness in his back all of his life. Dr. Cupic knows of nothing else that can be done for him (S.F. 265, 274, 275). Gaedecke is not and never will be employable for work that requires bending, stooping, lifting or things of that nature (S.F. 266). He is restricted to sedentary work for life (S.F. 268, 269, 275).

The result is that, if one goes by numbers, Gaedecke's overall permanent impairment from the results of the injury is 30% (S.F. 272), and his employable disability for any kind of strenuous activity is 100% (S.F. 275).

The surgery was obviously only partially beneficial to Gaedecke. At the time of the trial in November 1978, he was having pain most of the time, trouble in sleeping, his back and leg bothered him and any kind of activity made him stiff and sore. He was taking aspirin and valium (S.F. 286).